Design and Manufacturing Corp. *and* Coleman Collier and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Party to the Contract

Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America *and* Coleman Collier, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Party to the Contract. Cases 25-CA-11906 and 25-CB-4044

25 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 2 March 1981 Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent Union filed exceptions and supporting briefs, and Respondent Union filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge to the extent consistent herewith.

In his Decision, the Administrative Law Judge concluded in part that Respondent Employer and Respondent Union lawfully maintained and enforced superseniority provisions in their collective-bargaining agreement granting preferential seniority to all members of Respondent Union's bargaining committee and executive board[2] for the purposes of layoff and recall.[3] In reaching this conclusion, he relied on the finding that each of these union officers exercised responsibilities which bore a direct relationship to the effective and efficient representation of unit employees. Under this standard, accepted by a majority of the Board in *Limpco Mfg.*,[4] he found these superseniority provisions presumptively lawful.

The Board recently has reexamined the issue of superseniority for union officials in *Gulton Electro-Voice*,[5] and upon reconsideration has decided to overrule *Limpco* and its progeny and thus to follow no longer the standard for layoff and recall superseniority set forth above. In *Gulton*, the Board announced that it would find lawful such superseniority provisions only to the extent that they apply to union officers who process grievances or perform other on-the-job contract administration functions, described therein as steward-like duties. The rationale for the adoption of this more restrictive standard is fully set forth therein.

Under this new standard, we find merit in the General Counsel's exceptions contending that the maintenance and enforcement of the collective-bargaining agreement provisions granting superseniority for the purposes of layoff and recall was unlawful as it applied to Respondent Union's financial secretary, trustees, sergeant-at-arms, and guide.[6] As set forth in full in section III, A, of the Administrative Law Judge's Decision, none of the normal duties of these officials entails steward-like functions.[7] Accordingly, we find that, by the maintenance and enforcement of these seniority provisions with respect to the above-named officers, Respondent Employer has violated Section 8(a)(1) and Respondent Union has violated Section 8(b)(1)(A). We further conclude that, as a result of the application of these seniority provisions in selecting employees for layoff between January and June 1980, Respondent Employer discriminatorily laid off employees in violation of Section 8(a)(3) and (1) and that Respondent Union, by its insistence on the application of these superseniority pro-

[1] Respondent Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] As specified in the bargaining agreement, the Union's executive board consisted of the president, vice president, recording secretary, financial secretary, three trustees, sergeant-at-arms, and guide. The collective-bargaining committee consisted of the president, vice president, recording secretary, and four other elected committeemen. Subsequent to the execution of the instant bargaining agreement, the Union included the bargaining committeemen in the executive board.

[3] These provisions, under sec. 3.1 provided:

> (C) In the event that a member of the Bargaining Committee or a member of the Local Union Executive Board is about to be laid off from work on the basis of natural seniority, he or she shall be deemed to have preferential seniority for the purposes of replacing the least senior employee in the bargaining unit whose job they are qualified to perform.
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> (F) In the event that the Union representatives identified in . . . (C) above are laid off, they shall be recalled in reverse order of layoff provided that there is work for which they can qualify.

[4] *Electrical Workers Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), enfd. *sub nom. Anna D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978).

[5] 266 NLRB 406 (1983).

[6] No exceptions were taken to the Administrative Law Judge's conclusion that the grant of layoff and recall superseniority to Respondent Union's other officers and committeemen (see fn. 2, above) were not shown to be unlawful.

[7] In this respect we find that the participation of these officers in union executive board meetings during which grievances are discussed is not in the nature of an on-the-job steward-like function. In making this finding we rely particularly on evidence that these executive board meetings occur after regular work hours, and that none of the above-named union officials normally meets with management to discuss such grievances.

visions for the purposes of these layoffs, violated Section 8(b)(2) and (1)(A).

AMENDED REMEDY

In view of our finding of these unfair labor practices herein, as well as our adoption of those found by the Administrative Law Judge, we shall order, in addition to the remedy recommended by the Administrative Law Judge, that Respondent Union and Respondent Employer cease and desist from maintaining and enforcing the layoff and recall superseniority bargaining agreement provisions with respect to Respondent Union's financial secretary, trustees, sergeant-at-arms, and guide. To remedy the discriminatory application of these unlawful provisions, we shall also order that Respondent Employer offer to reinstate any employee who has been laid off as a result of such discrimination, and that Respondent Union shall notify Respondent Employer in writing that it has no objection to such reinstatement. We shall further order that the Respondents jointly and severally make affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Respondent Employer's backpay obligation shall run from the effective date of the discrimination against the affected unit employees to the time it makes such recall offers, while Respondent Union's obligation shall run from such effective date to 5 days after the date of its notification to Respondent Employer that it has no objection to such recall.[8] We shall also order that Respondent expunge from its files any reference to the unlawful layoffs, and shall notify the affected employees in writing that this has been done and that the unlawful layoffs will not be used as a basis for future personnel actions against them. Finally, we shall order that Respondent Employer cease and desist in any like or related manner from interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act, and that Respondent Union likewise cease and desist from restraining or coercing employees it represents from exercising those same rights.

[8] Member Jenkins would not terminate Respondent Union's backpay liability as of the date it notifies Respondent Employer that it has no objection to the recall of those affected by the unlawful superseniority provision herein. After such notification, Member Jenkins would continue to hold Respondent Union secondarily liable for any additional backpay amounts. See his dissent in *Claremont Resort Hotel & Tennis Club*, 260 NLRB 1088 (1982), and cases cited therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Employer Design and Manufacturing Corp., Connersville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing collective-bargaining provisions with Respondent Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America, according certain members of Respondent Union's executive board (financial secretary, trustees, sergeant-at-arms, and guide) superseniority for the purposes of layoff and recall.

(b) Discriminating against any employees by laying them off instead of the Union's financial secretary, trustees, sergeant-at-arms, or guide when such employees have greater seniority in terms of length of employment than has one of the aforementioned union officials.

(c) Maintaining collective-bargaining provisions with Respondent Union according members of the Respondent Union's executive board (president, vice president, recording secretary, financial secretary, trustees, sergeant-at-arms, and guide) superseniority for shift preference purposes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Union make any unit employees whole for any loss of earnings they may have suffered as result of the discrimination against them, such earnings to be determined in the manner set forth in the section of the Decision entitled "The Remedy" and offer immediate and full reinstatement to any employees who would not have been laid off but for the unlawful assignment of superseniority to the above-named officers.

(b) Expunge from its files any reference to the layoffs of any employees affected by the unlawful superseniority as applied to the above-named officers, and notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports,

and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility located in Richmond, Indiana, copies of the attached notices marked "Appendix A" and "Appendix B."[9] Copies of said notices, on forms provided by the Regional Director for Region 25, after being duly signed by representatives of Respondent Employer and Respondent Union, respectively, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for Region 25 for posting by Respondent Union.

(f) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent Design and Manufacturing Corp. has taken to comply herewith.

B. Respondent Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Maintaining and enforcing collective-bargaining provisions with Respondent Design and Manufacturing Corp. according certain members of Respondent Union's executive board (financial secretary, trustees, sergeant-at-arms, and guide) superseniority for the purposes of layoff and recall.

(b) Causing or attempting to cause Respondent Employer to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) Maintaining collective-bargaining provisions with Respondent Employer according members of Respondent Union's executive board (president, vice president, recording secretary, financial secretary, trustees, sergeant-at-arms, and guide) superseniority for shift preference purposes.

(d) Threatening employees with bodily harm or possible loss of their jobs for filing charges with the National Labor Relations Board.

(e) In any like or related manner restraining or coercing the employees of Respondent Employer in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Employer make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, such earnings to be determined in the manner set forth in the section of the Decision entitled "Amended Remedy."

(b) Notify the Respondent Employer in writing that it has no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off.

(c) Post at its office and meeting hall used by or frequented by its members and employees it represents at the Richmond, Indiana, facility of Respondent Employer copies of the attached notices marked "Appendix A" and "Appendix B."[10] Copies of said notices, on forms provided by the Regional Director for Region 25, after being duly signed by representatives of Respondent Employer and Respondent Union, respectively, shall be posted by Respondent Union, immediately upon receipt thereof, and be maintained by Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for Region 25 for posting by Respondent Employer.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[10] See fn. 9, *supra.*

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT maintain and enforce any provision in our collective-bargaining agreement with Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America, according certain members of its executive board (financial secretary, trustees, sergeant-at-arms, and guide) superseniority for the purposes of layoff and recall.

WE WILL NOT discriminate against any employees by laying them off instead of the above-named union officials when such employees have greater seniority in terms of length of employment than has one of the above-named union officials.

WE WILL NOT maintain any provision in our collective-bargaining agreement with the above-named Union according members of its executive board (president, vice president, recording secretary, financial secretary, trustees, sergeant-at-arms, and guide) superseniority for shift preference purposes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights set forth above.

WE WILL offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to those who were discriminatorily laid off instead of the above-named union officials.

WE WILL expunge from our files any reference to the layoffs of any employees affected by the unlawful superseniority as applied to the above-named union officers, and notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

WE WILL jointly and severally with the Union make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

DESIGN AND MANUFACTURING CORP.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT maintain and enforce any provision in our collective-bargaining agreement with Design and Manufacturing Corp. according certain members of our executive board (financial secretary, trustees, sergeant-at-arms, and guide) superseniority for the purposes of layoff and recall.

WE WILL NOT cause or attempt to cause Design and Manufacturing Corp. to discriminate against employees by requiring that the above-named union officials be retained as active employees, when other employees who have greater seniority in terms of length of employment are laid off.

WE WILL NOT maintain any provision in our collective-bargaining agreement with Design and Manufacturing Corp. according members of the executive board (president, vice president, recording secretary, financial secretary, trustees, sergeant-at-arms, and guide) superseniority for shift preference purposes.

WE WILL NOT threaten employees with bodily harm or possible loss of their jobs for filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce the employees in Design and Manufacturing Corp. in the exercise of their rights set forth above.

WE WILL jointly and severally with Design and Manufacturing Corp. make any unit employees whole for any loss of earnings they

may have suffered as a result of the discrimination against them, plus interest.

WE WILL notify the Employer that we have no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off.

LOCAL 2042, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSON, Administrative Law Judge: These consolidated cases were heard at Richmond, Indiana, on September 17, 1980,[1] pursuant to charges filed on February 25 by Coleman Collier, an individual, against Design and Manufacturing Corp. (herein referred to as Respondent Company) in Case 25-CA-11906 and against Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America (herein referred to as Respondent Union), in Case 25-CB-4044 and a consolidated complaint issued on April 14.

The consolidated complaint alleges that Respondent Company violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein referred to as the Act), and Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by maintaining provisions[2] in their collective-bargaining agreement giving members of Respondent Union's executive board (president, vice president, recording secretary, financial secretary, three trustees, sergeant-at-arms, and guide) top seniority for shift preference purposes and by giving members of Respondent Union's bargaining committee and executive board preferential seniority on layoffs and recalls provided they are qualified to perform the jobs and by their applying and enforcing such provisions thereby giving preference regarding layoffs to and employing Respondent Union's officers and agents while laying off employees who were not officers and agents of Respondent Union. It further alleges that Respondent Union violated Section 8(b)(1)(A) of the Act by threatening its members with physical harm, discharge, or other reprisals because they filed charges with the National Labor Relations Board.

Respondent Company in its answer served on April 18 denies having violated the Act.

Respondent Union in its answer served on April 24 denies having violated the Act and alleges as an affirmative defense that the "charging party and all others claiming to be aggrieved are precluded from seeking relief through these proceedings because they have failed to exhaust mandatory internal Union appeal procedures available to them under the UAW contract."

The issues involved are whether Respondent Company and Respondent Union violated Section 8(a)(1) and (3) of the Act and Section 8(b)(1)(A) and (2) of the Act as alleged by maintaining provisions in their collective-bargaining agreement giving top seniority for shift preference purposes to members of Respondent Union's executive board and by giving preferential seniority on layoffs and recalls to members of Respondent Union's bargaining committee and executive board and applied and enforced such provisions thereby giving preference regarding layoffs to and employing Respondent Union's officers and agents while laying off employees who were not officers and agents of Respondent Union; and whether Respondent Union violated Section 8(b)(1)(A) of the Act by unlawfully threatening its members for filing charges with the Board.

Upon the entire record in these cases and from my observations of the witnesses and after due consideration of the briefs filed by the parties, I hereby make the following:[3]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT COMPANY

Respondent Company, an Indiana corporation with its principal office and place of business located at Connersville, Indiana, operates various facilities in the State of Indiana, including a facility located at Richmond, Indiana, where it is engaged in the business of the manufacture, sale, and distribution of dishwashers and related products. During 1979 Respondent Company in the course of its operations sold and shipped goods, products, and materials, valued in excess of $50,000, from its Richmond facility directly to points located outside the State of Indiana and it purchased and received at that facility products, goods, and materials, valued in excess of $50,000, directly from points located outside the State of Indiana.

Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and the Duties of Respondent Union's Officers*

Respondent Company operates a plant located at Richmond, Indiana, where it is engaged in the manufacture, sale, and distribution of dishwashers and related products. It normally employs approximately 800 employees there. Included among its supervisory personnel are Executive Vice President and General Manager Robert Scelze and Industrial Relations Director Robert Marshal.[4]

[1] All dates referred to are in 1980 unless otherwise stated.

[2] These provisions are set forth *infra*.

[3] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record which I credit.

[4] Both Scelze and Marshall are supervisors under the Act.

Respondent Company's production and maintenance employees at the plant are represented by Respondent Union and the International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW) (herein referred to as the International), with which it has a collective-bargaining agreement covering them. This agreement by its terms was effective from January 30, 1978, until November 14 and contained automatic renewal provisions.

Respondent Union has its office located at Respondent Company's plant where it also keeps its records and conducts its business except for membership meetings which are held elsewhere.

Its executive officers as defined in article VII, section 1, of its bylaws are the president, vice president, recording secretary, financial secretary-treasurer, three trustees, guide, and sergeant-at-arms. Prior to an election held in May these officers were President Robert Curtis, Vice President Russ Klingman, Recording Secretary Roy Patton, Financial Secretary Everett Keller, Trustees William Carpenter, Arturo Gomez, and Don Vale, Sergeant-At-Arms Virgil King, Guide Mark Nix, and Bargaining Committee Members Charles Dale, Mike Shain, Jessie Lear, and Melvin Adams. Curtis, Gomez, Vale, King, Dale, and Lear were all reelected to their offices in the May election. The other new officers and their positions were Vice President Bob Allen, Recording Secretary Diane Pickering, Financial Secretary Tryna Rheinhardt, Trustee Everett Keller, Guide Roy Patton, and Bargaining Committee Members Willie Carpenter and Tom Mullens.

President Curtis described the duties of each of Respondent Union's officers[5] who are also all employees of Respondent Company.

His undisputed testimony which I credit concerning each of these officers reflects that the president is a member of the executive board; serves as chairman of the bargaining committee[6]; is responsible for all administrative duties; presides over all meetings he attends; approves all checks, vouchers, and drafts; deals with both management and employees; calls executive board meetings and insures members attend; and in conjunction with the executive board authorizes the purchases of materials, supplies, and office equipment. The president is also directly involved in grievances, sees that they are properly processed, and serves as chairman of all grievance meetings. His duties involve discussions on a daily basis with other officers who inform him of such matters as employee complaints.

The duties of the vice president, who is a member of the executive board and the bargaining committee, are to assist the president in performing all of his duties and in the president's absence the vice president acts in his place performing the same duties as the president. On occasions the vice president also investigates and attempts to settle grievances with Respondent Company.

The financial secretary is responsible for all financial matters including issuing checks, receiving dues from members, seeing that bills are paid promptly, and with the trustees conducts audits of all the books. Additionally, the financial secretary keeps the executive board and the president informed of the status of employees including when they are laid off, on sick leave, or delinquent in payment of dues. Insofar as grievances are concerned the financial secretary participates in discussions of and makes recommendations on grievances at all executive board meetings which the president or executive board feels need discussing or action taken and votes equally with other members of the executive board on them. On occasions, although not part of the regular duties, the financial secretary has filled in for an absent member of the bargaining committee in the third step of the grievance procedure.

The recording secretary is a member of the executive board and the bargaining committee; participates in contract negotiations; and is responsible for seeing that the president's correspondence is delivered to the president. With respect to grievances the recording secretary participates in the third step of the grievance procedure and informs them of the grievances, keeps track of all discussions, and participates in the presentation and settlement of the grievances.

There are three trustees. They are members of the executive board and have general control over the property. Their duties are to see that the proper insurance is maintained; the financial obligations of the constitution are complied with; the proper officers sign drafts drawn on Respondent Union; and making sure vouchers are authentic. The trustees' duties also include auditing Respondent Union's books. These audits, which are conducted by them and the financial secretary every 6 to 8 weeks at the plant where the books are kept, involve checking all expenditures made, checking lost time vouchers, upcoming revenues, and bank statements, and making certain the money received has been properly deposited and no funds misused. They then make a report at the next membership meeting. Everett Keller, who served as a trustee, estimated these audits last a day or more.

The sergeant-at-arms' duties are to maintain order at meetings; participate in all executive board meetings equally with other members; and perform tasks delegated to him by the president or other officers. Examples of such tasks include going after supplies and transporting and assisting visitors from the International.

The duties of the guide are to work in conjunction with the sergeant-at-arms at membership meetings, inspecting records and making certain those persons present are members in good standing, and assisting guests who are present at the meetings. The guide participates in all executive board sessions and performs whatever duties are assigned by the president or other officers. An example of such duties include research on grievances.

The bargaining committee is comprised of four committeemen along with the president, vice president, and recording secretary.[7] Its members are also members of

[5] Art. VII, sec. 2, of Respondent Union's bylaws defines the duties of each office are those as outlined in the International's constitution.

[6] Art. VII, sec. 2, of the bylaws provides that both the president and vice president serve on the bargaining committee.

[7] Sec. 3.3 of the collective-bargaining agreement defines the members of the bargaining committee as the president or his designee, recording secretary, and not more than four additional employees.

the executive board and its functions are to conduct negotiations; to meet with management regarding general plant problems; and to investigate and process grievances beginning at step two of the grievance procedure. On occasions the members get involved at the first step of the grievance procedure such as when members bypass the steward and go to a higher ranking officer to get faster action. The entire bargaining committee meet with Respondent Company at step three of the grievance procedure. It also deals with Respondent Company on grievances concerning the suspension and discharges of employees which under the terms of the collectlve-bargaining agreement are initiated at step two of the grievance procedure.

The executive board is comprised of the president, vice president, financial secretary, recording secretary, three trustees, sergeant-at-arms, guide, and the four bargaining committeemen.[8]

President Curtis explained that the bargaining committee by decision of the executive board was added to the executive board following problems within Respondent Union and in order to make the membership feel better represented and to give the executive board a more active role in the affairs of Respondent Union. The executive board in conjunction with the president authorizes the purchases of materials, supplies, and office equipment; deals with management concerning plant supplies, and office equipment; deals with management concerning plant problems; and is involved in the grievance procedure at the third step although it does not meet with Respondent Company regarding the filing or processing of these grievances. Weekly meetings are held in Respondent Union's office at the plant each Wednesday after work at which time various items are discussed and decisions made. These items involve lost time;[9] authorization for lost time payment; expenditures; plant problems including these dealing with layoffs and recalls; contract proposals; contract termination dates; and other union functions. Grievances are also discussed and recommendations are made to the bargaining committee concerning whether the grievances should be pursued with management, arbitrated, or withdrawn.

According to President Curtis these meetings are held on a weekly basis in order to satisfy a majority of members who felt that a majority of the officers were not running Respondent Union and a few officers were exercising too much control.

Section 4 of the collective-bargaining agreement provides for a four-step procedure in processing grievances. Step 1 involves the aggrieved employee and/or his steward and the employee's foreman. Step 2 involves the bargaining committee person and the industrial relations director. The third step involves the bargaining committee and allows for an International representative to be present meeting with representatives of management. The fourth and final step is arbitration.

Industrial Relations Director Marshall, who has been involved in the grievance procedure from step 2 through arbitration since November 1978, testified that during that period Respondent Union's guides, sergeant-at-arms, or trustees never acted as a representative of other employees or approached him regarding implementation of the contract or that he had ever met with the executive board to discuss grievances filed. He stated the president and recording secretary but not the financial secretary had participated in the grievance procedure.

B. *Unlawful Maintenance, Application, and Enforcement of Contractual Provisions Regarding Preferential Seniority*

The collective-bargaining agreement contains certain provisions relating to shift preference, layoff and recall, and preferential seniority accorded Respondent Union's officers and bargaining committee members.

Section 6.7 of the collective-bargaining agreement provides employees shift preference in order of their seniority provided they exercise their seniority within their job classification and department no more often than once each 3 months.

Section 6.6 of the collective-bargaining agreement provides in pertinent part, that in layoffs the most junior employee shall be laid off first, provided that the senior employee to be retained can perform the available work and that employees will be recalled in the reverse of layoff subject to the same considerations.

However, the agreement also contains the following provisions under Section 3.1 which are in issue here and alleged to be unlawful:[10]

> (B) Members of the Local Union Executive Board (President, Vice President, Recording Secretary, Financial Secretary, three (3) Trustees, Sergeant-At-Arms and Guide) shall have top seniority for shift preference purposes as provided in Section 6.7 during their terms of office.
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> (C) In the event that a member of the Bargaining Committee or a member of the Local Union Executive Board is about to be laid off from work on the basis of natural seniority, he or she shall be deemed to have preferential seniority for the purposes of replacing the last senior employee in the bargaining unit whose job they are qualified to perform.
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> (F) In the event that the Union representatives identified in (B) or (C) above are laid off, they shall be recalled in reverse order of layoff provided that there is work for which they can qualify.

President Curtis explained the reason for giving the bargaining committee and the executive board members top seniority for shift preference purposes under the collective-bargaining agreement was because Respondent Company's representatives possessing the authority to resolve plant problems all worked during the day shift and that was when Respondent Company and Respondent

[8] Under art. VIII, sec. 1, of the bylaws, the executive board consists of the executive officers and bargaining committee.

[9] Lost time is the time spent away from work on union business which includes time spent on grievances and arbitration.

[10] Subsec. A which provides members of the bargaining committee with top seniority for shift preference purposes as provided in sec. 6.7 was not alleged to be unlawful.

Union conducted their business. An additional reason was because there were a lot of business transactions between the parties carried on at Respondent Company's Connersville facility. However, the only such transaction described involved the financial secretary having to go there to get the payroll or union dues and things not taken care of at the Richmond plant which he said were only available during the workday at Connersville.

However, Curtis acknowledged that when the second shift was previously in operation problems arising on that shift would be handled on days but if union officials were needed they would be held over at the end of the shift.

President Curtis denied that to his knowledge any officer or member of the bargaining committee had ever used preferential seniority for shift preference purposes and no evidence was presented to establish otherwise.

A notice dated January 14 was posted by Respondent Company informing employees there would be a layoff on January 18. According to Industrial Relations Director Marshall prior to posting such notice there were only about 385 to 390 employees still working and of them approximately 37 or 38 were included in this layoff. Marshall, who determines which employees are to be laid off, credibly testified in making the selection of those employees to be laid off he followed the collective-bargaining agreement. This included retaining Respondent Union's officers, with the exception of Everett Keller who was retained because of his job skills, solely because of their preferential seniority under the collective-bargaining agreement which resulted in more senior employees being laid off who otherwise would have not been laid off work. Additional layoffs also occurred on March 3, April 14, and June 2.[11] Marshall stated he followed the same procedure on these layoffs which resulted in certain of Respondent Union's officers and members of the bargaining committee being retained solely because of their preferential seniority. Those retained as a result included Virgil King in the March 3 layoff; on the April 14 layoff they included Melvin Adams, Jessie Lear, Michael Shain, and Virgil King; and on the June 2 layoff they included Robert Curtis, Robert Allen, Diana Pickering, Jessie Lear, Tom Mullins, Charles Dale, and Willie Carpenter.

Although some of the officers of Respondent Union were included in the various layoffs, Marshall explained it was because there was not enough work available for them. Marshall also testified that those officers possessing skills which would require them to work without regard to their seniority were Everett Keller, who was a maintenance man, and John Vale, who set up and operated wire machines.

A seniority list comprised of the names of more than 300 of the most senior employees in order of their seniority, which includes the names of all Respondent Union's officers and lists the periods employees were working, on leave, or laid off, reflects the following officers were working and holding office at the time of each of the four layoffs wlthout their being included in those layoffs: On the January layoff they were Everett Keller, Mark Nix, Donald Vale, Robert Curtis, Roy Patton, Russell Klingman, Jessie Lear, Michael Shain, and Virgil King; on March 3 they were Everett Keller, Charles Dale, Mark Nix, Donald Vale, Robert Curtis, Willie Carpenter, Roy Patton, Russell Klingman, Arturo Gomez, Melvin Adams, Jessie Lear, Michael Shain, and Virgil King; on April 14 they were Everett Keller, Charles Dale, Mark Nix, Donald Vale, Robert Curtis, Willie Carpenter, Roy Patton, Russell Klingman, Arturo Gomez, Melvin Adams, Jessie Lear, Michael Shain, and Virgil King; and on June 2 they were Everett Keller, Charles Dale, Donald Vale, Diana Pickering, Robert Curtis, Willie Carpenter, Robert Allen, Thomas Mullins, Melvin Adams, and Jessie Lear.

Industrial Relations Director Marshall stated that at the time of the hearing on September 17 Respondent Company was only employing approximately 42 hourly paid employees including 27 maintenance employees. President Curtis' estimates were approximately the same and he acknowledged that among those employees still working there were about 12 or 13 officers.

According to President Curtis Respondent Union had seven stewards on the day shift, in addition to four stewards on the night shift when it was operating. Under the collective-bargaining agreement the stewards do not have preferential seniority on layoffs, although they are the first persons recalled when an employee in the group the steward represents is to be recalled. Curtis testified that when there are no stewards on the job he either processes the grievance at step 1 himself or designates a committeeman or another officer to process it.

Executive Vice President and General Manager Scelze testified he discussed with both President Curtis and International Representative Dugger that employees would be laid off and suggested they suspend the application of section 3.1 of the collective-bargaining agreement pertaining to preferential seniority until they completed the pending Board cases and got a decision. However, their position was they doubted they could go along with such a suggestion and subsequently left word with his secretary negative to the idea. Scelze in a letter to Curtis the following day, May 21, confirmed their conversation. Respondent Company then decided to shut off production as of May 30 and Scelze acknowledged that Respondent Company thereafter continued to comply with the provisions of its collective-bargaining agreement in laying the employees off work.

C. *Unlawful Threats Made by Respondent Union*

Coleman Collier, an employee of Respondent Company and a member of Respondent Union, filed the charges against them in the instant case on February 25. The charge against Respondent Union alleged it had violated the Act by its officials working illegally under the superseniority clause in the contract during a plant shutdown.

Collier testified that about February 27 and while at work Respondent Union's steward, Randy Falcone, told him there was a contract out on him. Upon asking Falcone what it was about Falcone did not reply. Collier further stated that a week or two later Falcone repeated

[11] The General Counsel contends that these along with the January 18 layoff were the four layoffs on which employees were discriminatorily laid off.

the statement to him and did so on several other occasions.

Steward Falcone acknowledged telling Collier they had a contract out on him. His explanation was Collier had approached him and asked if the Local was upset at him for filing the charge he had filed whereupon he informed Collier he did not think it was very pleased about it and then made the statement about it had a contract out on him. Falcone further testified he repeated this statement when Collier asked him what he said and the following day Collier again asked him about it and what had happened and why he had not heard anything whereupon he told Collier they had a slow hit man. Collier denied having any further conversations about it.

Prior to these conversations both Collier and Falcone had daily conversations with one another about matters such as sports.

Falcone testified that at the hearing he considered their conversation to be a joke. However, he acknowledged at the time such statements were made there was no laughter.

Based on the testimony of Collier and admissions by Steward Falcone, I find that on or about February 27 Falcone threatened Collier with bodily harm for filing a charge with the National Labor Relations Board against Respondent Union. The fact that Falcone now claims it was only a joke was never conveyed to Collier at the time.

Collier further testified on March 7 Financial Secretary Everett Keller approached him at work and said he had heard Collier had filed charges with the National Labor Relations Board against the Company and the Union. Upon replying Keller said he had indicated through signing a card when he was hired that he would not do that. When Collier denied having any knowledge of such a card, Keller said it could cost him his job or something.

Keller, who is now a trustee, acknowledged that while serving as financial secretary he had a conversation with Collier about the charge. However, he denied making any statement to Collier about losing his job, stating they only discussed whether Collier should have exhausted the channels within Respondent Union before filing charges. Although Keller claimed that during their conversation Respondent Union's vice president was present, the vice president did not testify to corroborate his testimony.

I credit Collier, who I find was a more credible witness than Keller, and find on March 7 Respondent Union's financial secretary, Keller, threatened Collier with possible loss of his job for filing charges with the National Labor Relations Board against Respondent Union and Respondent Company. Apart from my observations of the witnesses in discrediting Keller, I do not find his explanation of the conversation plausible.

D. *Analysis and Conclusions*

The General Counsel contends that Respondent Company violated Section 8(a)(1) and (3) of the Act and Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by maintaining provisions in their collective-bargaining agreement giving top seniority for shift preference purposes to members of Respondent Union's executive board and by giving preferential seniority to members of Respondent Union's bargaining committee and executive board and applied and enforced such provisions thereby giving preference regarding layoffs to and employing Respondent Union's officers and agents while laying off employees who were not officers and agents of Respondent Union. It is further contended that Respondent Union violated Section 8(b)(1)(A) of the Act by unlawfully threatening its members for filing charges with the Board.

Both Respondent Company and Respondent Union, which also raises as an affirmative defense in its answer that the failure to exhaust internal union appeals precludes granting relief, deny having violated the Act.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(3) of the Act provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. Section 8(b)(2) of the Act prohibits a union from causing or attempting to cause an employer to discriminate against employees in violation of Section 8(a)(3) of the Act or because of their nonmembership in a union.

Provisions contained in collective-bargaining agreements granting union officers superseniority for purposes of layoff and recall are presumptively valid where such officers are charged with the effective and efficient representation of unit employees. See *Otis Elevator Co.*, 231 NLRB 1128 (1977); and *Electrical Workers Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), enfd. *sub nom. Anna M. D'Amico v. NLRB*, 582 F.2d 820, 824 (3d Cir. 1978). It is the General Counsel's burden of proving affirmatively that the application of such provisions to those union officers is invalid.

The findings *supra*, establish that the collective-bargaining agreement between Respondent Company and Respondent Union contains provisions granting preferential seniority to members of Respondent Union's bargaining committee and executive board provided they are qualified to perform the jobs. During layoffs occurring on January 18, March 3, April 14, and June 2, Respondent Company followed these provisions in selecting the employees to be laid off from work which resulted in certain members of the bargaining committee and executive board being retained as employees solely on the basis of their preferential seniority while employees with more seniority, who were not members of the bargaining committee or executive board, were laid off.

The General Counsel in his brief argues, contrary to the positions taken by both Respondent Company and Respondent Union, that the authorized duties and those

duties actually performed by certain[12] of the officers of Respondent, who were accorded preferential treatment, were not of such a nature or sufficient enough to legally entitle them to preferential seniority.

Based on the evidence *supra*, Respondent Union's officers include the president, vice president, recording secretary, financial secretary, three trustees, guide, and sergeant-at-arms. The bargaining committee is comprised of the president, vice president, recording secretary, and four committeemen. All of the officers and all members of the bargaining committee, as provided for in the bylaws, constitute the executive board.

The executive board, which represents all of the unit employees and acts for them, meets weekly at which time it not only deals with the internal affairs of Respondent Union, but also handles the administration of the collective-bargaining agreement. This latter function includes such matters as dealing with plant problems arising under the collective-bargaining agreement, including layoffs and recalls; making recommendations for and adopting contract proposals; and determining whether the collective-bargaining agreement should be terminated or renewed. Additionally, the executive board considers grievances at the third step of the grievance procedure, determines what actions should be taken on them, and makes recommendations on such grievances to the bargaining committee. Further, whenever stewards are not working on the job the president or an officer or committeeman appointed by the president handles grievances at step 1.

The bargaining committee is involved in contract negotiations and under the collective-bargaining agreement it also handles grievances beginning at step 2 of the grievance procedure.

Thus, apart from the specific duties performed by each of Respondent union's officers, as enumerated above, they as members of the executive board, along with the members of the bargaining committee, who are also members of the executive board, perform duties which they are authorized to perform and are necessary and essential to the effective and efficient representation of the employees and in administering the collective-bargaining agreement including the processing of grievances.

Under these circumstances and for the reasons discussed, I am persuaded and find that the General Counsel has failed to prove as is his burden that the preferential seniority provisions accorded to members of Respondent Union's bargaining committee and executive board under the collective-bargaining agreement regarding layoffs and recalls are unlawful under the Act. Accordingly, Respondent Company and Respondent Union did not violate Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, as alleged by maintaining, applying, or enforcing these provisions.

Insofar as the allegation about unlawful shift preference is concerned, the evidence *supra* establishes the collective-bargaining agreement contains a provision giving members of Respondent Union's executive board including the president, vice president, recording secretary, financial secretary, three trustees, guide, and sergeant-at-arms top seniority for shift preference purposes. While this provision is maintained in the collective-bargaining agreement, there is no evidence to establish it has been applied or enforced.[13] However, since 1979 only one shift has been in operation.

Respondent Union's reasons given for having such a provision were Respondent Company's representatives possessing the authority to resolve plant problems all worked on the day shift and because of the necessity of having to obtain various records from Respondent Company, office located elsewhere which could only be accomplished during the day. However, Respondent Company, which is also a party to the collective-bargaining agreement containing the provision, proffered no evidence to establish that either its personnel or records, a matter within its own exclusive control, could not be made available if necessary during other shifts or at the Richmond plant where the unit employees worked. Further, Respondent Union's president, Curtis, acknowledged that when the second shift previously operated its own officials, who worked on the first shift could, if necessary, stay over on the next shift to handle problems which arose.

For these reasons I do not find sufficient evidence has been presented by either Respondent Union or Respondent Company to justify the inclusion of such provision which otherwise benefits Respondent Union's officers solely on the basis of their holding office and to the detriment of those employees who are not officers.

Superseniority clauses which on their face are not limited to layoff and recall are presumptively unlawful because of the inherent tendency of such clauses to discriminate against employees for union-related reasons thereby restraining and coercing employees with respect to their rights under Section 7 of the Act and the party asserting their legality has the burden of rebutting this presumption. *Dairylea Corporative*, 219 NLRB 656, 658 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976). The mere maintenance of such clauses in collective-bargaining agreements, absent evidence rebutting the presumption and establishing justification for them, violates the Act. *A.P.A. Transport Corp.*, 239 NLRB 1407 (1979).

Applying the applicable law to the evidence here I find this provision giving members of Respondent Union's executive Board top seniority for shift preference purposes is presumptively unlawful and neither Respondent Union nor Respondent Company proffered sufficient evidence to rebut this presumption. Therefore, I find Respondent Company and Respondent Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by maintaining this provision in their collective-bargaining agreement. Section 10(b) of the Act would not, as urged in Respondent Union's brief, constitute a defense since this provision was being maintained in the collective-bargaining agreement when the charges were filed as well as afterwards.

[12] The allegations contained in the consolidated complaint were not limited to certain officers but included all members of the bargaining committee and the executive board.

[13] The General Counsel at the hearing disavowed any contention this provision was being applied or enforced as alleged but only contended it was being unlawfully maintained.

With respect to the unlawful threats made to Coleman Collier, the findings *supra* establish that about February 27 Respondent Union's steward, Falcone, threatened Collier with bodily harm for filing a charge with the National Labor Relations Board against Respondent Union and on March 7 its financial secretary, Keller, threatened Collier with possible loss of his job for filing charges with the National Labor Relations Board against Respondent Union and Respondent Company.

A union may not coerce employees in their right to file charges with the Board. *NLRB v. Marine & Shipping Workers of America*, 391 U.S. 418 (1968).

Since these threats by both Falcone and Keller would tend to restrain and coerce Collier in the exercise of his lawful right to file charges with the Board, I find that by their making such threats the Respondent Union violated Section 8(b)(1)(A) of the Act.

The remaining issue, raised as an affirmative defense in Respondent Union's answer that the failure of Coleman Collier and all others claiming to be aggrieved were precluded from relief because of their failure to first exhaust their internal union appeals procedure, is rejected inasmuch as union members are not required to exhaust their internal union remedies before resorting to the Board's processes. *NLRB v. Marine & Shipbuilding Workers, supra.*

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Company and Respondent Union set forth in section III, above, occurring in connection with Respondent Company's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Design and Manufacturing Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 2042, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. By maintaining a provision in their collective-bargaining agreement according members of Respondent Union's executive board (president, vice president, recording secretary, financial secretary, three trustees, sergeant-at-arms, and guide), top seniority for shift preference purposes, Respondent Company and Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively.
4. By threatening an employee with bodily harm and with possible loss of his job for filing charges with the National Labor Relations Board Respondent Union has restrained and coerced an employee in the exercise of his rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Company and Respondent Union have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Accordingly, they shall be ordered to cease and desist from maintaining in their collective-bargaining agreement that provision herein found to be unlawful and post appropriate notices.

[Recommended Order omitted from publication.]